Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

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DATE: July 2, 1997
CASE NO: 96-INA-61

In the Matter of:

PRESBYTERIAN MEDICAL CENTER OF PHILADELPHIA
Employer

On Behalf of:

DR. NABEEL ABDULLAH
Alien

Appearance: Ann A. Ruben, Esquire
Philadelphia, PA
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27(c).

Statement of the Case

On June 13, 1994, Presbyterian Medical Center ("employer") filed an application for labor certification to enable Dr. Nabeel Abdullah ("alien") to fill the position of Resident (PGY II & III) [2] at a yearly wage of $ 34,500 (AF 61). The job duties are described as follows:

> Evaluation and treatment of patients on all internal medicine services; medical intensive care and coronary care units, emergency department and hospital base out-patient clinics. Supervise first year residents and medical students (AF 61).

The job requirements are a Medical degree, or the foreign equivalent, with one year of experience in the job offered or in the related occupation of PGY-I. Other special requirements are specified as follows:

> Must have successfully completed PGY-I position in ACGME approved internal medicine program with good references from Chairman or Program Director and demonstrated excellence and clinical treatment. Must have Pennsylvania license or be immediately eligible for Pennsylvania trainee license and passed USMLE Parts I through III or FMGEMS and FLEX examination (AF 61).

On April 4, 1995, the CO issued the first Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.21 (b) (5) which requires the employer to document that the requirements are the minimum necessary for the performance of the job. The CO noted that the alien gained one year of experience in internal medicine while working for the employer which violates this provision. The CO stated this finding may be rebutted by: (1) submitting evidence which clearly shows that the alien at the time of hire had the qualifications now required, (2) submitting evidence that the alien gained the required experience working for the employer in jobs which were not similar to the job for which labor certification is sought, (3)

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

[2] PGY is an abbreviation for post-graduate year. PGY-1 refers to the first post-graduate year in a medical residency program, whereas PGY-II & III refers to the second and third years. Throughout this decision, PGY-I is used interchangeably with medical intern, and PGY-II & III is used interchangeably with medical resident.

submitting evidence that it is not feasible due to business necessity to hire a worker with less than the qualifications presently required, or (4) eliminating the requirements (AF 39).

The CO also found that the employer violated § 656.21 (b) (2) (i) (A) (B) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. Specifically, the CO objected to the employer's requirement that all candidates possess teaching and supervisory experience. The CO therefore requested the employer to delete or alter the requirement and readvertise, or demonstrate that the requirement arises out of business necessity (AF 41).

In rebuttal, dated April 20, 1995, the employer provided evidence which demonstrated the alien's completion of more than one year of postgraduate residency in internal medicine at the Belle Alliance Center in Paris, France. The employer also amended the labor certification application by deleting the teaching and supervisory experience requirement.

The CO issued a second Notice of Findings on April 27, 1995. The CO continued to dispute the employer's compliance § 656.21 (b) (5). He stated that the employer failed to demonstrate that the alien's experience at Belle Alliance Center was an approved ACGME internal medicine program which the employer required. The CO also noted that the employer required applicants to have good references by the chairman or program director of the residency program and "demonstrated excellence in clinical treatment." Therefore, the CO requested the employer to submit references from the alien's residency program which attested to these qualifications (AF 32). Although the CO determined that the employer cured the violation regarding the teaching and supervising requirement by deleting it, the CO found another requirement to be unduly restrictive. Specifically, the CO found the requirement that applicants possess one year of experience as a PGY-I to be unduly restrictive. The CO determined that the medical residency program is a continuum where residents enter a program and expect to finish it (AF 32). The CO also found that the position was tailored to the alien's qualifications because the alien completed his first year of residency with the employer. The CO therefore found this requirement to be restrictive, and requested the employer to submit evidence which clearly establishes the position of resident is different from the position of intern.

In rebuttal to the second NOF, dated July 5, 1995, the employer submitted letters from previous employers which documented that the alien received good references and that the alien excelled in clinical treatment as a PGY-I. The employer also argued that the PGY-I requirement is not a result of employer preference. In support of this assertion, the employer contended that its program sharply divides the responsibilities between residents and interns.

> There are numerous fundamental dissimilarities between the job duties of the intern and the resident. Of principal significance is the fact the PGY-I intern has virtually no independent decision making authority with respect to patient diagnosis or care. The intern is responsible for taking an initial admission history and performing a physical and for writing orders and daily progress notes as well as review and

> follow up of laboratory and radiologic studies....The supervising resident is assigned to the team as a leader. The resident is responsible for seeing every patient at the time of admission and for reviewing the admission history and physical exam and order with the intern. The supervisory resident is responsible for overseeing the day to day details of patient care as well as for providing guidance, supervision, and training for the intern (AF 20).

The CO issued the Final Determination on August 21, 1995 denying the labor certification. The CO determined that the employer never provided evidence showing that the alien met all of the employer's requirements before he began working for the employer. The CO therefore concluded that the alien gained the required one year of experience as an intern while working for the employer which violates the minimum job requirements regulation found at § 656.21 (b) (5). Furthermore, the CO maintained that the positions of intern and resident are the same as they simply represent an individual's progression in a medical residency program. Because the CO concluded that the positions were essentially the same, he also found that the alternative requirement that applicants have one year of experience as an intern was unduly restrictive.

On September 26, 1995, the employer requested review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 2).

Discussion

The issues presented by this appeal are whether the employer specified the minimum job qualifications for the offered position pursuant to § 656.21 (b) (5), and whether the requirement that applicants possess one year of experience as a medical intern or medical resident is unduly restrictive under § 656.21 (b) (2).

Section 656.21 (b) (5) provides that an employer is required to document that its requirements for the job opportunity are the minimum necessary for the performance of the job and that the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity, or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. This section addresses situations where the employer requires more stringent qualifications for a U.S. worker than it requires of the alien, and prevents the employer from treating an alien more favorable than it would a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn,* 89-INA-105 (Feb. 14, 1990). It is well-settled that an employer violates § 656.21 (b) (5) if it hired the alien with lower qualifications than it specified on the labor certification application. *See Capriccio's Restaurant,* 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries,* 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory,* 88-INA-104 (Dec. 22, 1988); *MMMats, Inc,* 87-INA-540 (Nov. 24, 1987). Furthermore, the Board also has determined that under § 656.21 (b) (5), an employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.*, 89-INA-284 (May 14,

1991).

In this case, the employer required applicants to have completed a year as a PGY-I in an medical residency program approved by the Accreditation Council for Graduate Medical Education (ACGME). The CO denied certification finding that the alien did not meet this requirement at the time the labor certification was filed, and therefore concluded that the employer failed to list its actual minimum requirements for the position. In rebuttal, the employer put forth two arguments in an effort to show that the alien met this requirement. First, the employer contended that the alien met this requirement due to his employment with the Belle Alliance Medical Center in Paris, France. The employer submitted a certificate from this institution that attested to the alien's serving as an intern from February 1, 1990 to October 31, 1991. In the second NOF, the employer specifically requested evidence which demonstrated that the program at Belle Alliance Medical Center was approved by ACGME, but the employer never provided this evidence. As a result, we find that the CO correctly determined that the program Belle Meade did not qualify the alien for the position.

The employer offered a second argument attempting to show that the alien met the minimum requirements prior to the time it applied for labor certification. Specifically, the employer argued that the alien was qualified because he completed a year as a PGY-I with the employer which is an ACGME-approved residency program. For an employer to include experience that the alien gained while working for it in a lesser job, the employer must show that the lesser job and the offered job are "sufficiently dissimilar." *Brent-wood Products, Inc.*, 88-INA-259 (Feb. 28, 1989 (*en banc*). In *Delitizer Corp. of Newton*, 88-INA-482 (May 9, 1990) (*en banc*), the Board specified a number of factors to be used in determining whether two positions are "sufficiently dissimilar." These factors include a comparison of the job duties and requirements for each position, whether the higher position has supervisory responsibilities, the employer's hiring hierarchy, the employer's prior employment practices, whether and by whom the higher position has been filled previously, whether the higher position is new, the percentage of time spent performing each job duty in each job, and the salaries of each job. *Delitizer Corp., supra*.

In support of this argument, the employer asserted that the offered position contains significant supervisory experience as residents supervise interns and medical students. The employer added that the PGY-I position has no supervisory responsibility at all. The employer also contended that the positions are at different levels within the hiring hierarchy, and pointed out that approximately 15% of all interns are not promoted to the resident level. The employer insisted that the job duties of the two positions are different. For instance, interns have no independent decision-making authority with respect to patient diagnosis or care. Interns take initial admission histories, perform physicals, and review laboratory and radiologic studies. On the other hand, residents oversee interns, report to physicians about the status of patients, review admission histories, plan discharges, and transfer patients between general medicine and critical care units. The employer further stated that the job requirements for interns and residents differ significantly. "The only universal requirement to become an intern is to have completed medical

school and successfully pass certain entrance examinations. However, to be promoted to the position of resident from the position of intern, an individual must have additionally mastered fundamental techniques and skills involved in hands on patient care" (AF 19).

In the Final Determination, the CO determined that the alien's year as a medical intern with the employer did not qualify him for the position because it was essentially the same as the offered job. The CO reasoned:

> It is this office's position that the medical residency program is a continuum, or one job. Medical residents enter a program and expect to finish it; the resident passes from year one to year two to year three in a normal progression, and therefore, the resident is not promoted from one job to another. Although responsibility is greater as training progresses, and with high level having more responsibility than the previous level, this is part of normal growth and progression of a residency program is in not considered a different position (AF 8).

The CO also determined that there was no significant change in the essential duties because both positions revolved around patient care. Thus, he concluded that the positions were substantially similar.

We believe *In the Matter of Maimonides Medical Center,* 93-INA-534 (Nov. 29, 1994) is controlling. In that case, the employer filed for labor certification for an alien to fill the position of psychiatric resident or PGY-II. The minimum requirements listed for the position were specified as an M.D. and one year of experience in the job offered. In the Final Determination, the CO found that the employer's stated job requirements did not represent the actual minimum requirements for the job opportunity because the residency program represented one job. The Board agreed with the CO stating "the position is essentially a continuum with augmented responsibilities throughout but with no significant change in the essential duties: primary patient care." *Maimonides, supra.* Thus, the Board concluded that the employer failed to document that its requirements are the minimum necessary for the job opportunity. Under the Board's holding in *Maimonides*, we find that the employer in the instant case has failed to demonstrate that the specified job requirements are the actual minimum requirements for the offered position. Because the employer failed to comply with § 656.21 (b) (5) of the regulations, certification cannot be granted and further examination of the other reasons cited by the CO is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.